

PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

A. THE CLAIMS PROCESS

4. PROCEDURAL ISSUES AT THE DISTRICT DIRECTOR OR THE HEARING LEVEL

b. Hearing Issues

Section 725.421(b) provides that, prior to the hearing, the district director is required to submit to the administrative law judge a document setting forth the contested and uncontested issues in the claim. 20 C.F.R. §725.421(b); see **Chaffins v. Director, OWCP**, 7 BLR 1-431 (1984). The issues considered by an administrative law judge at the hearing are generally restricted to those: (1) identified by the district director, (2) raised in writing before the district director, or (3) not "reasonably ascertainable" by the parties at the time the claim was before the district director. See 20 C.F.R. §725.463(a), (b); **Mullins v. Director, OWCP**, 11 BLR 1-132, 1-134 (1988) (en banc)(Ramsey, C.J., dissenting). For discussion of stipulations and conceded issues, see Part V.A.10. of the Desk Book.

The purposes of Section 725.463 are to force the parties to develop evidence prior to the hearing and to expedite cases by ensuring that the parties are not surprised by new issues at the hearing. See **Carpenter v. Eastern Associated Coal Corp.**, 6 BLR 1-784 (1984). When new issues are raised before the administrative law judge, the administrative law judge has the discretion under Section 725.463(b) to remand the case to the district director, to hear and resolve the new issue, or to refuse to consider the new issue. See **Callor v. American Coal Co.**, 4 BLR 1-687 (1982), *aff'd sub nom. American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 6 BLR 2-81 (10th Cir. 1984). An issue not previously considered before the district director may be adjudicated if the parties consent; such consent may be inferred where the parties develop evidence and are aware of each other's intent to litigate the issue. See **Carpenter v. Eastern Associated Coal Corp.**, 6 BLR 1-784 (1984); see also **Grant v. Director, OWCP**, 6 BLR 1-619 (1983).

The Board held that the Director's second Motion for Reconsideration challenging claimant's entitlement to benefits, which was filed more than thirty days after the administrative law judge's original Decision and Order but within thirty days of the administrative law judge's Supplemental Decision and Order, was not timely filed inasmuch as the Director's second motion was filed more than thirty days after the

issuance of the Decision and Order it contested, namely the administrative law judge's original Decision and Order. The Board further noted that even if the Director's second motion were considered timely, the Director would still be precluded from challenging the merits of claimant's entitlement because his failure to raise the issue in his first motion resulted in the issue being waived. ***Knight v. Director, OWCP***, 14 BLR 1-166 (1991).

CASE LISTINGS

[fact-finder erred in considering existence of pneumoconiosis: not listed as contested issue by district director nor raised at hearing] ***Perry v. Director, OWCP***, 5 BLR 1-527 (1982).

[adjudicator erred in considering issues not listed as contested by district director] ***Simpson v. Director, OWCP***, 6 BLR 1-49 (1983).

[where parties stipulated at least ten years of coal mine employment at informal conference and district director's did not list it as issue, adjudicator improperly considered issue; fundamental fairness requires parties be advised of issues to be decided] ***Derry v. Director, OWCP***, 6 BLR 1-553 (1983).

[fact-finder erred in dismissing claim, finding that record failed to establish identity of claimant; since issue raised for first time by fact-finder, he must hold record open for parties to develop evidence on this point] ***Lewullis v. Lehigh Valley Anthracite, Inc.***, 6 BLR 1-588 (1983)(Ramsey, CJ., dissenting).

[failure to object to adjudicator consideration of issues not listed as "contested" before district director precludes raising point on appeal] ***Grant v. Director, OWCP***, 6 BLR 1-619 (1983).

[section 725.463 no bar to adjudicator's consideration of issues not listed as "contested" before district director since parties developed relevant evidence and were aware of each other's intent to litigate issues in question] ***Carpenter v. Eastern Associated Coal Corp.***, 6 BLR 1-784 (1984).

[Section 413(b) rereading prohibition may be raised on reconsideration before administrative law judge] ***Martin v. Director, OWCP***, 7 BLR 1-72 (1984).

[employer, by acknowledging it was responsible operator, did not waive right to contest claimant's eligibility at hearing] ***Vance v. Eastern Associated Coal Corp.***, 8 BLR 1-68 (1985).

[district director properly listed total disability as contested issue notwithstanding that pro se claimant stated that he was not totally disabled; district director implicitly found stipulation not in claimant's best interests] ***Wilson v. Youghiogheny and Ohio Coal Co.***, 8 BLR 1-73 (1985).

[adjudicator erred in considering issues raised one week before hearing where easily ascertainable and no excuse for failing to raise them before district director provided by Director] ***Thornton v. Director, OWCP***, 8 BLR 1-277 (1985).

[adjudicator should have considered relief under Section 26 of Longshore Act, 33 U.S.C. §926, applicable to black lung claims by 30 U.S.C. §932(a), [allowing for recovery of costs where opponent institutes or continues, without reasonable grounds, proceedings] although employer failed to raise issue before the hearing; grounds could not have been anticipated prior to hearing as they concern purported discrepancies in claimant's testimony] ***Bolden v. U.S. Stevedores Corp.***, 8 BLR 1-398 (1985).

DIGESTS

The Board held that the failure of claimant's counsel, an associate in the same law firm as claimant's employed counsel, to object at hearing to employer's motion to enlarge the district director's list of contested issues or the introduction of evidence on these new issues, resulted in a waiver of claimant's right to rely on the list and affirmed the administrative law judge's enlargement of the list at the hearing. ***Prater v. Director, OWCP***, 8 BLR 1-461 (1986).

The Board held that claimant was not entitled to contest, in a separate proceeding, employer's status as the designated responsible operator before being required to establish his claim. It was therefore within the administrative law judge's discretion to dispose of the case by denying the claim on the merits without addressing the question of whether employer qualified as a responsible operator. ***Seewald v. Imperial Coal Co.***, 8 BLR 1-469 (1986).

The Board held that the Director had waived the right to present evidence on the issue of entitlement where he failed to: (1) contest entitlement at the administrative law judge's original hearing; (2) to contest the substantive issues of entitlement in the motion for reconsideration; and (3) to raise the issue of entitlement before the Board. ***Kincell v. Consolidation Coal Co.***, 9 BLR 1-221, 1-223 (1986).

The Third Circuit held that claimant could not raise at the hearing the issue of the operator's failure to timely controvert liability as that issue was reasonably ascertainable while the case was before the district director. ***Linton v. Director, OWCP***, No. 85-3547 (3d Cir. Jun. 10, 1986)(unpub.).

The Board, overruling its decision in **Mullins v. Director, OWCP**, 7 BLR 1-561 (1984), held that the issue of eligibility of a claimant in a survivor's case is conceded if it is easily ascertainable at the district director level but is not raised at the level by the opposing party. **Mullins v. Director, OWCP**, 11 BLR 1-132 (1988)(en banc)(Ramsey, C.J., dissenting).

The administrative law judge committed reversible error in denying benefits on the grounds that claimant had failed to establish the existence of pneumoconiosis arising out of coal mine employment inasmuch as neither issue was checked as contested on Form CM-1025 or raised in writing before the district director; thus, Director conceded that claimant has pneumoconiosis related to coal mine employment. **Kott v. Director, OWCP**, 17 BLR 1-9 (1992).

Because employer argued that the corporate officers should be personally liable for benefit payments and requested that Mr. Varney and Mr. White be renamed as possible putative responsible operators, the Board stated that it was proper for the administrative law judge to address this issue. **Lester v. Mack Coal Co.**, 21 BLR 1-126 (1999).

Claimant waived his right to rely on employer's alleged admission of the existence of pneumoconiosis and the causation of claimant's total disability where claimant's counsel at the hearing did not object to employer's contesting these issues and did not object to the introduction of employer's evidence relating to these issues. **Johnson v. Royal Coal Co.**, 22 BLR 1-132 (2002)(Hall, J., dissenting).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.459, which grants to administrative law judges the discretion to shift to employer costs incurred by claimants' production of witnesses, regardless of which party prevails, lacks the specific statutory authorization for fee-shifting required by **W. Va. Univ. Hosp. v. Casey**, 499 U.S. 83, 97-100 (1991), and, therefore, is invalid on its face. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 875, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). [Subsequently, the Department of Labor revised the regulation at Section 725.459 to provide that a proponent of a witness called for cross-examination shall pay the witness' fee].

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